

E-Filed 2/28/07

NOT FOR CITATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

SYNAPSIS, LLC,

Plaintiff,

V.

EVERGREEN DATA SYSTEMS, INC., et al.,

Defendants.

Case Number C 05-01524 JF

ORDER¹ DENYING IN PART
MOTION FOR COSTS AND
ATTORNEY'S FEES

[re. Docket No. 215]

On November 28, 2006, defendants and counter-claimants Evergreen Data Systems, Inc., Bruce McAllister, and Steven DeMartini (collectively, “Counter-Claimants”) moved to dismiss their counterclaim against William Akel (“Akel”). The motion was granted on January 16, 2007. In response to Akel’s apparent desire to recover costs, the Court wrote that “if Akel seeks to recover costs and/or attorney’s fees, he must do so by means of a noticed motion within thirty days of the issuance of this order.” January 16, 2007 Order 3. On January 30, 2007, Akel moved for attorney’s fees and costs. Counter-Claimants oppose the motion. Having reviewed the motion, opposition, and reply, the Court concludes that the motion is appropriate for decision

¹ This disposition is not designated for publication and may not be cited.

1 without oral argument. *See* Civ. L.R. 7-1(b).

2 Akel states no basis for an award of attorney's fees. None of the counterclaims brought
3 against Akel² pertains to the Sales Agent Agreement or the Non-Disclosure Agreement at issue in
4 the action between Synapsis and the Counter-Claimants. Accordingly, neither of those
5 agreements provides a basis for an award of attorneys' fees. Akel does not point to another
6 contract that might allow an award of attorney's fees. The statutory provisions cited by Akel do
7 not provide a basis for such an award. Akel does make reference to the attorneys' fees provision
8 of the Copyright Act, 17 U.S.C. § 505, but the Copyright Act is not at issue in the counterclaims.
9 Cal. Civ. Code § 1717 pertains to actions on a contract, and thus does not apply to the
10 counterclaims against Akel. Cal. Civ. Code § 2339 pertains to liability for the ratified acts of an
11 agent; it does not provide an independent basis for an award of attorney's fees. Cal. Civ. Proc.

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26 ² The counterclaims against Akel alleged (a) intentional interference with existing
27 contractual relationships (third counterclaim); (b) intentional interference with prospective
28 contractual relationships (fourth counterclaim); (c) negligent interference with prospective
contractual relations (fifth counterclaim); (d) inducing breach of contract (sixth counterclaim);
and (e) unfair competition (seventh counterclaim).

1 Code §§ 128.5,³ 128.7,⁴ 1021,⁵ 1032, 1033.5,⁶ and 1034⁷ do not grant Akel a substantive right to
 2 attorneys' fees.

3 Fed. R. Civ. P. 54(d)(1) and Civ. L.R. 54 govern the taxation of costs in this action. *See*
 4 *In re Merrill Lynch Relocation Management, Inc.*, 812 F.2d 1116, 1120 n.2 (9th Cir. 1987)
 5 (noting in a diversity case that, "as a general proposition, the award of costs is governed by
 6 federal law under Rule 54(d).") (citing 10 Wright, Miller & Kane, *Federal Practice and*
 7 *Procedure: Civil* 2d § 2669 at 214 (1983)). Fed. R. Civ. P. 54(d)(1) provides that "costs other
 8 than attorneys' fees shall be allowed as of course to the prevailing party unless the court
 9 otherwise directs." A prevailing party must serve and file a bill of costs within fourteen days of
 10 the entry of judgment or of an "order under which costs may be claimed." Civ. L.R. 54-1. If
 11 Akel wishes to recover costs, he should serve and file a bill of costs within fourteen days of the
 12 issuance of this order. Akel must abide by all applicable court rules and may not include
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14 ³ Cal. Civ. Proc. Code § 128.5 allows a trial court to order attorney's fees incurred "as a
 15 result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary
 16 delay." This statute does not provide a basis for an award of attorney's fees to Akel for two
 17 reasons. First, Akel offers no evidence that Counter-Claimants' actions or tactics were
 18 undertaken in bad faith, and second, "when fees are based upon misconduct by an attorney or
 19 party in the litigation itself, rather than upon a matter of substantive law, the matter is
 20 procedural," and federal law applies. *In re. Larry's Apartment, LLC*, 249 F.3d 832, 838 (9th Cir.
 2001). Accordingly, to the extent that Akel seeks attorney's fees as part of an implied motion for
 21 sanctions, that motion is governed by Fed. R. Civ. P. 11. However, while Akel refers to a
 22 sanctions motion, he does not provide the Court with grounds on which to find that sanctions are
 23 appropriate.

24 ⁴ Cal. Civ. Proc. Code § 128.7 allows sanctions for the filing of a frivolous pleading.
 25 However, it does not provide a basis for an award of attorney's fees in this instance for the same
 26 reasons that Cal. Civ. Proc. Code § 128.5 does not.

27 ⁵ Cal. Civ. Proc. Code § 1021 provides that attorney's fees are to be granted when
 28 provided for by statute or by agreement. As discussed above, neither basis supports an award of
 29 attorney's fees to Akel.

30 ⁶ Cal. Civ. Proc. Code §§ 1032, 1033.5 govern the allowance of costs in state courts and
 31 are not relevant to the instant motion.

32 ⁷ Cal. Civ. Proc. Code § 1034 governs costs on appeal in the state court system and is not
 33 relevant to the instant motion.

1 attorneys' fees in his bill of costs.⁸ If Counter-Claimants object to the costs taxed by the clerk,
2 they should file their objections in accordance with Civ. L.R 54-2.⁹

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4 Good cause therefore appearing, IT IS HEREBY ORDERED that:

5 1. Akel's motion for attorneys' fees is DENIED.
6 2. Akel shall file any bill of costs within fourteen (14) days of the issuance of this
7 order.
8 3. The motion hearing scheduled for March 16, 2007 is vacated.

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10 DATED: February 28, 2007.

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14 JEREMY FOGEL
15 United States District Judge
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19 ⁸ The Court having determined that Akel has no substantive right to attorneys' fees under
20 any of the California statutes that he cites, there is no question whether such fees can be
21 recovered as costs under Fed. R. Civ. P. 54. *Cf. Kellems v. California CIO Council*, 6 F.R.D.
22 358 (N.D.Cal. 1946) (holding that Court has discretion to allow attorney's fees as costs in a libel
23 action heard under diversity jurisdiction where the California libel statute allows the recovery of
24 costs of \$100 to cover attorney's fees).

25 ⁹ The Court concludes that the question whether Akel is a prevailing party for the
26 purpose of taxing costs under the federal rules is not adequately briefed to allow resolution at this
27 time. Accordingly, any objection may include an argument that Akel is not a prevailing party for
28 the purpose of the applicable rules. The Court notes that the Seventh Circuit has held that "a
voluntary dismissal with prejudice renders the opposing party a 'prevailing party' within the
meaning of Rule 54," *Mother and Father v. Cassidy*, 338 F.3d 704, 708 (7th Cir. 2003), and that
the Ninth Circuit appears receptive to a similar view. *See Zenith Ins. Co. v. Breslaw*, 108 F.3d
205, 207 (9th Cir. 1997) (per curiam) (discussing voluntary dismissal of claims before trial and
noting that dismissal with prejudice is tantamount to a decision on the merits).

1 This Order has been served upon the following persons:

2 Daniel C. DeCarlo decarlo@lbbslaw.com; kkim@lbbslaw.com; pink@lbbslaw.com;
3 creyes@lbbslaw.com

4 Manuel Albert Martinez Mmartinez@steinlubin.com, msaephan@steinlubin.com

5 Jonathan S. Pink pink@lbbslaw.com; creyes@lbbslaw.com

6 Michael Navid Radparvar radparvar@lbbslaw.com

7 Jeffrey F. Sax jsax@sswesq.com

8 William Shibly Akel wmakel@counterstrike.com

9 H. Joseph Nourmand

10 H. Joseph Nourmand Law Offices

660 S. Figueroa Street

24th Floor

Los Angeles, CA 90017

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